AGENDA
SCARBOROUGH TOWN COUNCIL WORKSHOP
WEDNESDAY – MAY 15, 2024
WORKSHOP RE: PROPOSED CANNABIS AMENDMENTS – 5:30 P.M.
HYBRID MEETING

TO VIEW TOWN COUNCIL MEETING & OFFER PUBLIC COMMENT:
https://scarboroughmaine.zoom.us/j/89764563244

TO VIEW TOWN COUNCIL MEETING ONLY:
https://www.youtube.com/channel/UCD5Y8CFy5HpXMftV3xX73aw

Item 1. Call to Order.

Item 2. Those Present.

Item 3. Discussion on the proposed amendments to Chapter 1018 – Cannabis Establishment Licensing Ordinance:

a. Landlords/Licensee Representative – 30 Minutes

b. Town Council Discussion – 60 Minutes

1. Enforcement Changes-Potential Amendments
2. Land Use.

Item 4. Adjournment.

TOWN OF
SCARBOROUGH, MAINE

MEMORANDUM

DATE:	March 8, 2023
TO:	Town Council – Ordinance Committee
FROM:	Liam Gallagher, Assistant Town Manager
RE:	Cannabis Ordinance Changes

Per the Ordinance Committee's request please find enclosed proposed changes to Chapter 1018, the Cannabis Establishment Licensing Ordinance, for discussion and consideration. In addition to the zoning changes, which will be drafted separately by legal counsel, the Committee requested an enforcement process modeled after the Town's existing Good Neighbor ordinance intended to address other public nuisance issues e.g. sound and light.

Additionally, previously staff recommended changes to the application requirements for identification and security plans are included.

Administrative - require a Photo or Governmental ID (not both)

Security - Clarify and refine security standards as recommended by the Police Department liaison.

Odor Enforcement – While the Council adopted a comprehensive and progressive enforcement process in August with other Ordinance changes, concerns expressed by residents and abutters persist. While there is an ample amount of odor reports (73 reports from 8/16 – 2/14), staff have not verified a complaint as set forth in the existing ordinance to date. While this record may be suggestive of the problem, or lack thereof, we have at the committee's request included parallel language from the good neighbor ordinance, which would require Town staff to investigate any reports of odor. This change would provide a greater opportunity for staff to verify odor reports. To accomplish this, we have expanded the enforcement authority to include the Scarborough Police Department in addition to the Code Enforcement division.

There are two primary considerations the Committee has expressed interest in better understanding; what businesses would be subject to the zoning change and what is a responsible time period to allow those businesses to phase out their operations.

Zoning Change – With regard to what businesses would be subject to the zoning change, there remains some questions in this regard.

In conversations with counsel, cannabis businesses operating with local approval, prior to December 13, 2018, are likely protected by the state statute and therefore could continue to operate irrespective of the underlying zoning. This assertion comes with a few caveats; first, medical cultivation is not a recognized cannabis operation under the statute but given the statutes listing of other cannabis operations (manufacturing, testing, and retail), it is safe to presume that medical cultivation would be included in the statutory protection. Second, the businesses that enjoy this statutory protection would still be subject to the Town's licensing regulations, including odor requirements, which, should the odor concerns persist, would likely test the Town's regulatory authority against the statutory protections to operate. A cursory

review of documentation on file would suggest we have four businesses in the Pine Point Overlay that have been in continuous operation since December 13, 2018.

We also have a level of confidence that businesses established after December 13, 2018 would not have the same statutory protections to continue operating and would be subject to the underlying zoning change and phase out.

An area that appears less clear are businesses that began operating after December 13, 2018 in spaces that were previously operating with local authorization as cannabis establishments. Said differently, these are commercial spaces that had locally authorized cannabis businesses prior to December 13, 2018 but have since changed owners or tenants after that date. This scenario would apply to multiple spaces in the Pine Point Overlay District and Pleasant Hill Corridor and would limit the long-term impact of the zoning change.

Amortization Process - As for determining a period for the amortization process, the standard that the Council should apply should be informed by what a reasonable period would be for the business owner to satisfy their business expectations. In essence, what is the period necessary for the business owner to recoup the investment made under the previous rules. While much has been made of a five-year period, that was simply based on a previously upheld amortization process. The Council should solicit public comment and input from business owners to better understand what standard and timeline should apply for existing non-confirming businesses.

As Approved by the Town Council at first reading on April 17, 2024

Chapter 1018
Town of Scarborough
Cannabis Establishments Licensing Ordinance

BE IT HEREBY ORDAINED by the Town Council of the Town of Scarborough, Maine, in Town Council assembled, that the following amendments to Chapter 1018 - the Town of Scarborough Cannabis Establishments Licensing Ordinance, be and hereby is amended, as follows (additions are underlined; deletions are struck through):

Section 1. Purpose.

The purpose of this Ordinance is to regulate and license Cannabis Establishments as defined in this Ordinance and by the State of Maine under the Marijuana Legalization Act, 28-B M.R.S.A. Chapter 1, and the Maine Medical Use of Marijuana Act, 22 M.R.S.A. Chapter 558-C, as may be amended, in order to promote the health, safety, and general welfare of the residents of Scarborough. [Amended 08/16/2023]

Persons or entities wishing to establish a Cannabis Establishment within the Town of Scarborough shall first obtain a license from the Scarborough Town Council (hereinafter "the Town Council") and shall be subject to the provisions of this Ordinance. [Amended 08/16/2023]

Section 2. Authority.

This Ordinance is adopted pursuant to the authority granted by 28-B M.R.S.A. §401 *et seq.,* as may be amended, and 22 M.R.S.A. §2421 *et seq.*, as may be amended.

Section 3. Definitions.

The following definitions shall apply to this Ordinance:

Adult use cannabis shall mean "adult use cannabis" as that term is defined in 28-B M.R.S.A. §102(1), as may be amended. [Amended 08/16/2023]

Adult Use Cannabis Cultivation Facility shall mean a "cultivation facility" as that term is defined in 28-B M.R.S.A. §102(13), as may be amended. [Amended 08/16/2023]

Adult use cannabis product shall mean "adult use cannabis product" as that term is defined in 28-B M.R.S.A. §102(2), as may be amended. [Amended 08/16/2023]

Adult Use Cannabis Products Manufacturing Facility shall mean a "products manufacturing facility"
as that term is defined in 28-B M.R.S.A. §102(43), as may be amended. [Amended 08/16/2023]

Adult Use Cannabis Testing Facility shall mean a "testing facility" as that term is defined in 28-B M.R.S.A. §102(54), as may be amended. [Amended 08/16/2023]

Applicant shall mean a person that has submitted an application for licensure as a Cannabis

Establishment pursuant to this Ordinance. [Amended 08/16/2023]

Cannabis Odor Panel shall mean the panel of municipal staff tasked with investigating odor complaints in sections 11; 3 and 11;4. The Odor Panel shall include three of the following positions; Assistant Town Manager, a representative of the Fire Department, a representative of the Police Department, the Zoning Administrator, and a Code Enforcement Officer. [Adopted 08/16/2023]

Cultivate or *cultivation* shall mean the planting, propagation, growing, harvesting, drying, curing, grading, trimming or other processing of Cannabis for use or sale. It does not include manufacturing. [Amended 08/16/2023]

De Minimis changes shall mean minor changes to a submitted floor plan of less ~~that~~than -50%, improvements to odor mitigation plans, enhancements to security plans, or changes to ownership interest or officers of not greater than 50%. [Adopted 08/18/2021]

Licensed premises shall mean the premises, or facility, specified in an application for a State or Local License pursuant to this Ordinance that are owned or in possession of the Licensee and within which the Licensee is authorized to cultivate, manufacture, distribute, sell, or test adult use cannabis, adult use ~~cannabis products~~cannabis products, medical cannabis or medical cannabis products in accordance with the provisions of this Ordinance and the requirements of State law and regulations. [Amended 08/16/2023]

Licensee shall mean a person licensed pursuant to this Ordinance.

Local License shall mean any license required by and issued under the provisions of this Ordinance.

Local Licensing Authority shall mean the Town Council, as further specified in the provisions of this Ordinance.

Manufacture or manufacturing shall mean the production, blending, infusing, compounding or other preparation of cannabis products, including, but not limited to, cannabis extraction or preparation by means of chemical synthesis. It does not include cultivation. [Amended 08/16/2023]

*Cannabis s*hall mean "cannabis" as that term is defined in 28-B M.R.S.A. §102(27) as may be amended. [Amended 08/16/2023]

Cannabis concentrate shall mean the resin extracted from any part of a cannabis plant and every compound, manufacture, salt, derivative, mixture or preparation from such resin, including, but not limited to, hashish. In determining the weight of cannabis concentrate in a cannabis product, the weight of any other ingredient combined with cannabis to prepare a cannabis product may not be included. [Amended 08/16/2023]

Cannabis Establishment shall mean an Adult Use Cannabis Cultivation Facility, an Adult Use Cannabis Products Manufacturing Facility, an Adult Use Cannabis Testing Facility, a Medical Cannabis Dispensary, a Medical Cannabis Testing Facility, a Medical Cannabis Manufacturing Product Facility, and a Medical Cannabis Cultivation Facility. A Cannabis Establishment does not include an Adult Use Cannabis Store or a Medical Cannabis Caregiver Retail Store, which are not permitted in the Town of Scarborough. [Amended 08/16/2023]

Medical Cannabis shall mean the medical use of cannabis, with the term "medical use" as defined in 22 M.R.S §2422(5), as amended. [Amended 08/16/2023]

Medical Cannabis caregiver shall mean a "caregiver" as that term is defined in 22 M.R.S.A.
§2422(8-A), as may be amended. [Amended 08/16/2023]

Medical Cannabis Caregiver Retail Store shall mean "caregiver retail store" as that term is defined in 22 M.R.S.A. §2422(1-F) as may be amended.

Medical Cannabis cultivation area shall mean a "cultivation area" as that term is defined in 22 M.R.S.A. §2422(3), as may be amended. [Amended 08/16/2023]

Medical Cannabis Cultivation Facility shall mean a medical cannabis cultivation area used or occupied by one or more medical cannabis registered caregivers and a facility licensed under this ordinance to cultivate, prepare and package medical cannabis at a location that is not the residence of the Registered Caregiver or Qualifying Patient. [Amended 08/16/2023]

Medical Cannabis Dispensary shall mean a "registered dispensary" as that term is defined in 22 M.R.S.A. §2422(6), as may be amended. [Amended 08/16/2023]

Medical Cannabis product shall mean a "cannabis product" as that term is defined in 22 M.R.S.A. §2442(4-L), as may be amended. [Amended 08/16/2023]

Medical Cannabis Products Manufacturing Facility shall mean a "manufacturing facility" as that term is defined in 22 M.R.S.A. §2422(4-R), as may be amended. [Amended 08/16/2023]

Medical cannabis qualifying patient shall mean a "qualifying patient" as that term is defined in 22 M.R.S.A. §2422(9), as may be amended. [Amended 08/16/2023]

Medical cannabis registered caregiver shall mean a "registered caregiver" as that term is defined in 22 M.R.S.A. §2422(11), as may be amended. [Amended 08/16/2023]

Medical Cannabis Testing Facility shall mean a "cannabis testing facility" as that term is defined in 22 M.R.S.A. §2422(5-C), as may be amended. [Amended 08/16/2023]

Plant Canopy shall mean "Plant canopy" as that term is defined in 28-B M.R.S.A. §102(41), as may be amended.

Owner shall mean a person whose beneficial interest in a Cannabis Establishment is such that the person bears risk of loss other than as an insurer, has an opportunity to gain profit from the operation or sale of a Cannabis Establishment and/or has a controlling interest in a Cannabis Establishment. [Amended 08/16/2023]

Person shall mean a natural person, partnership, association, company, corporation, limited liability company or organization or a manager, agent, owner, director, servant, officer or employee thereof. "Person" does not include any governmental organization.

State License shall mean any license, registration or certification issued by the State Licensing
Authority.

State Licensing Application shall mean the application form and supporting materials required by the State for the purpose of a person obtaining a State license, registration or certification for the cultivation, manufacture, distribution, testing and sale of adult use Cannabis, adult use Cannabis products, medical Cannabis and/or medical Cannabis products in this State. [Amended 08/16/2023]

State Licensing Authority shall mean the authority (or authorities) created by the State for the purpose of regulating and controlling the licensing of the cultivation, manufacture, distribution, testing and sale of adult use Cannabis, adult use Cannabis products, medical Cannabis and/or medical Cannabis products in this State. [Amended 08/16/2023]

Section 4. License Required.

No person may establish, operate or maintain a Cannabis Establishment without first obtaining a license from the Town Council.

Any grandfathered use pursuant to Section10.5.A of this Licensing Ordinance shall obtain a license from Town Council within 6 months of the adoption of this Ordinance; however, the standards of Section 10.A.(2, 3, 4) are not applicable to licensing process of these grandfathered activities.

Section 5. License Application. [Amended 08/16/2023]

An application for a license must be made on a form provided by the Town. All applicants must be qualified according to the provisions of this Ordinance. Applicants shall provide sufficient information to demonstrate that they meet all qualifications and standards established in this Ordinance.

The application for a Cannabis Establishment license shall contain the following information**:**

A. Name of Applicant.

1. If the applicant is an individual**:** The individual shall state their legal name and any aliases and submit proof that they are at least twenty- one (21) years of age.

2. If the applicant is a partnership**:** The partnership shall state its complete name, and the names of all partners, whether the partnership is general or limited, submit a copy of the partnership agreement, if any, and submit proof that all partners are at least twenty-one (21) years of age.

3. If the applicant is a corporation**:** The corporation shall state its complete name, the date of its incorporation, evidence that the corporation is in good standing under State law, the names and capacity of all officers, directors and principal stockholders, the name of the registered corporate agent, the address of the registered office for service of process, and submit proof that all officers, directors and principal stockholders are at least twenty-one (21) years of age.

4. If the applicant is a limited liability company (LLC)**:** The LLC shall state its complete name, the date of its establishment, evidence that the LLC is in good standing under State law, the names and capacity of all members, a copy of its operating agreement, if any, the address of its registered office for service of process, and submit proof that all members are at least twenty-one (21) years of age.

5. If the applicant intends to operate the Cannabis Establishment under a name other than that of the applicant, they must state the Cannabis Establishment's name and submit the required registration documents.

B. The applicant's mailing address and residential address.

C. Recent passport-style photograph(s) of the applicant(s)~~.~~ or governmental issued photo identification

~~D. The applicant's driver's license.~~

E. A sketch showing the configuration of the subject premises, including building footprint, plant canopy square footage calculations, interior layout with floor space to be occupied by the business, and parking plan. The sketch must be drawn to scale with marked dimensions.

F. The location of the proposed Cannabis Establishment, including a legal description of the property, street address, and telephone number. The applicant must also demonstrate that the property meets the zoning requirements for the proposed use. [Amended 08/16/2023]

G. If the applicant has had a previous license under this Ordinance or other similar Cannabis Establishment license applications in another town in Maine, in the Town of Scarborough, or in another state denied, suspended or revoked, they must list the name and location of the Cannabis Establishment for which the license was denied, suspended or revoked, as well as the date of the denial, suspension or revocation, and they must list whether the applicant has been a partner in a partnership or an officer, director, or principal stockholder of a corporation that is permitted/licensed under this Ordinance, whose license has previously been denied, suspended or revoked, listing the name and location of the Cannabis Establishment for which the permit was denied, suspended, or revoked as well as the date of denial, suspension or revocation. [Amended 08/16/2023]

H. If the applicant holds any other permits/licenses under this Ordinance or other similar Cannabis Establishment license from another town, the Town of Scarborough, or state the applicant shall provide the names and locations of such other permitted/licensed businesses, including the current status of the license or permit and whether the license or permit has been revoked. [Amended 08/16/2023]

I. The type of Cannabis Establishment for which the applicant is seeking a license and a general description of the business including hours of operation.

J. Sufficient documentation demonstrating possession or entitlement to possession of the proposed licensed premises of the Cannabis Establishment pursuant to a lease, rental agreement, purchase and sale agreement or other arrangement for possession of the premises or by virtue of ownership of the premises.

K. A copy of a Town Tax Map depicting the property lines of any public or preexisting private ~~school within~~school within one thousand (1000) feet of the subject property. ~~For the~~For ~~purposes~~the purposes of this Ordinance, "school" includes a public school, private school, or public preschool program all as defined in 20-A M.R.S.A. §~~1, or~~1,

or any other educational facility that serves children from prekindergarten to grade 12, as well as any preschool or daycare facility licensed by the Maine Department of Health and Human Services.

L. Evidence of all required state authorizations, including evidence of a caregiver registration in good standing, a conditional license pursuant to Title 28-B, food license, and any other required state authorizations.

M. A copy of the security plan as required by Section 10(A)(6) of this Ordinance.

N. A copy of the odor and ventilation mitigation plan as required by Section 10(A)(7) of this Ordinance.

O. A copy of the operations plan, as required by Section 10(A)(8) of this Ordinance.

P. Consent for the right to access the property as required by Section 10(B) of this Ordinance.

Q. Evidence of insurance as required by Section 10(C)(1) of this Ordinance.

R. Medical cannabis registered caregivers and other applicants submitting applications and supporting information that is confidential under 22 M.R.S.A. §2425-A(12), as may be amended, and the Maine Freedom of Access Act, 1 M.R.S.A. §402(3)(F), shall mark such information as confidential. [Amended 08/16/2023]

Section 6. Application and License Fees. [Amended 08/18/2021; 08/16/2023]

A. Applicant Fee. An applicant must pay a $350 application fee upon submission. Applicants are also responsible for the Town's expenses associated with the review of an application, including the cost of any third-party review if necessary.

B. License Fee. Local License fees are set forth below and shall be paid annually:

1. Adult Use Cannabis Cultivation Facility**:**

(a) Tier 1**:** 0 to 500 SF of plant canopy**:** $750.

(b) Tier 2: 501-2,000 SF of plant canopy: $3,000.

(c) Tier 3: 2,001-7,000 SF of plant canopy: $7,500.

(d) Tier 4: greater than 7,000SF of plant canopy: $10,000

2. Adult Use or Medical Cannabis Testing Facility: $1,000

3. Adult Use or Medical Cannabis Products Manufacturing Facility: $2,500

4. Medical Cannabis Cultivation Facility: $750

C. Application Change Fee: License holders seeking to make de minimum changes to an existing license: $150. [Adopted 08/18/2021]

Section 7. Licensing Authority and Procedure. [Amended 08/18/2021]

A. The initial application for a license shall be processed by the Town Clerk and reviewed and approved by the Town Council.

B. Complete application. In the event that the Town Clerk determines that a submitted application is not complete, the Town Clerk shall notify the Applicant within ten (10) business days that the application is not complete and shall inform the Applicant of the additional information required to process the application.

C. Public hearing.

1. A public hearing by the Town Council on an application for a license shall be scheduled after receipt of a completed application. The Town Clerk shall publish public notice of the hearing not less than ten (10) days prior to the hearing in a newspaper of general circulation in Cumberland County.

2. When an application is determined to be complete, the Town Clerk shall, at the applicant's expense, give written notification to all abutting property owners within five-hundred (500) feet of the parcel on which the proposed license is sought of the date, time, and place of the meeting at which the application will be considered. Notification shall be sent at least ten (10) days prior to the first meeting at which the complete application is to be reviewed. Failure ~~of any~~of any property owner to receive the notification shall not necessitate another hearing or invalidate any action of the Board. For purposes of this section, the owners of the abutting properties shall be considered to be the parties listed by the tax assessor for the Town of Scarborough.

D. A renewal application shall be subject to the same application and review standards as applied to the initial issuance of the license. Renewal applications from applicants in good standing, with no change, or de minimis, to the original application, may be approved by the Town Manager or their designee, so long as all other criteria and requirements as outlined in this Section and Section 10, have been met. The Town as part of the renewal process, shall consider compliance from prior years, and based upon that review, may recommend conditions to any future license to correct, abate, or limit past problems to forward to the Town Council for action. [Amended 08/18/2021]

E. Responsibilities and review authority.

1. The Town Clerk shall be responsible for the initial investigation of the application to ensure compliance with the requirements of this Ordinance. The Town Clerk shall consult with other Town Departments and any appropriate State Licensing Authority as part of this investigation.

2. No Local License shall be granted by the Town Council until the Police Chief, the Fire Chief, and the Code Enforcement Officer have all made the determination that the Applicant complies with this and all other local ordinance and state laws and provides a written recommendation to the Town Clerk. Where an agent of the Town determines that is necessary for the Town to consult with a third-party expert consultation to the applicant. Before doing so, however, the Town shall give reasonable notice to the applicant of its determination of need, including the basis for the determination; the third-party that the Town propose to engage; and then estimated fee

for the third-party consultation. The applicant shall have the opportunity respond for up to (10) business days from receipt of the Town's notice before the Town engages the third-party. Whenever inspections of the premises used for or in connection with the operation of a licensed business are provided for or required by ordinance or State law, or are reasonably necessary to secure compliance with any ordinance provision or State law, it shall be the duty of the Applicant or licensee, or the person in charge of the premises to be inspected, to admit any officer, official, or employee of the Town authorized to make the inspection at any reasonable time that admission is requested.

3. The Town Council shall have the authority to approve license and renewal applications, subject to the exception outlined in 7(D) above, and impose any conditions on a license that may be necessary to insure compliance with the requirements of this Chapter or to address concerns about operations that may be resolved through the conditions. The failure to comply with such conditions shall be considered a violation of the license. [Amended 08/18/2021]

4. The Town Manager, or designee, with the endorsement of the Council Chair, shall have the authority to approve de minimis changes to an existing license subject to continued compliance with this Section and Section 10 below. [Adopted 08/18/2021]

Section 8. License Expiration and Renewal. [Amended 08/18/2021; 08/16/2023]

A. A new license, when granted, shall be valid until August 31st, immediately following said granting of said license, except that new licenses granted during July and August shall be valid until August 31st of the following calendar year. [Amended 08/16/2023]

B. Renewal applications must be submitted at least 45 days prior to the date of expiration of the annual Local License. An application for the renewal of an expired license shall be treated as a new license application.

C. Licenses issued under this Ordinance are not transferable to a new owner. A transfer in ownership interest, change in the officers of an owner, of greater than 50% of the ownership interest or officer shall require a new license. Licenses are limited to the location for which they are issued and shall not be transferable to a different location. A Licensee who seeks to operate in a new location shall acquire a new Local License for that location. [Amended 08/18/2021]

Section 9. Denial, Suspension or Revocation of License.

A. A Local License under this Ordinance shall be denied to the following persons:

1. A person who fails to meet the requirements of this Ordinance. Where an Applicant is an entity rather than a natural person, all natural persons with an ownership interest shall meet these requirements.
2. A person who has had a license for a Cannabis Establishment revoked by the Town or by the State. [Amended 08/16/2023]

3. An Applicant who has not acquired all necessary State approvals and other required local approvals prior to the issuance of a Local License.

B. The Town may suspend or revoke a license for any violation of this Chapter, Chapter 1000a, Chapter 405, or any other applicable building and life safety code requirements. The Town may suspend or revoke a license if the licensee has a State License for a Cannabis Establishment suspended or revoked by the State. The Licensee shall be entitled to notice and a hearing prior to any suspension or revocation, except where the reason for suspension or revocation could reasonably threaten health, safety, or welfare, as long as notice and a hearing is provided as soon as practicable. [Amended 08/16/2023]

Section 10. Performance Standards for License [amended 08/18/2021]

A. General.

1. All Cannabis Establishments shall comply with applicable state and local laws and regulations. [Amended 08/16/2023]
2. Cannabis Establishments shall only be located within the zoning districts permitted in the Scarborough Zoning Ordinance. [Amended 08/16/2023]
3. Cannabis Establishments may not be located on property within 1,000 feet of the property line of a preexisting school as required and defined in Section 5(K) of this Ordinance. [Amended 08/16/2023]
4. Required setbacks shall be measured as the most direct, level, shortest, without regard to the intervening structures or objects, straight-line distance between the school property line and the property line of the parcel of land on which the Cannabis Establishment is located. If the Cannabis Establishment is located within a commercial subdivision, the required setback shall be measured from the closest portion of a building that is used for the Cannabis Establishment to the property line of the school. Presence of a town, county, or other political subdivision boundary shall be irrelevant for purposes of calculating and applying the distance requirements of this Section. [Amended 08/16/2023]
5. Pursuant to 22 M.R.S.A. §2429-D(3), Caregiver Retail Stores, Medical Cannabis Dispensaries, Medical Cannabis Testing Facilities, Medical Cannabis Manufacturing Facilities and Medical Cannabis Cultivation Facilities that were operating with Town approval prior to December 13, 2018, are grandfathered in their current location and current use and shall be treated as legally non-conforming uses in accordance with Article III of the Scarborough Zoning Ordinance, provided, however, that said Cannabis Establishments shall apply for and obtain a license. If any non-conforming use of land ceases for any reason for a period of more than one year, any subsequent use of such land shall conform to the regulations specified by the Zoning Ordinance for the district in which such land is located. [Amended 08/16/2023]
6. Security measures at all Cannabis Establishment premises shall include, at a minimum, the following**:**
    a. Security surveillance cameras installed and operating twenty-four (24) hours a day, seven (7) days a week, with thirty (30) day video storage, to monitor all entrances,

along with the interior and exterior of the premises, to discourage and facilitate the reporting of criminal acts and nuisance activities occurring at the premises; and

b. Door and window combination video and motion detector intrusion system and contact sensors with audible alarm and remotely accessible ~~smart phone~~ monitoring, maintained in good working condition; and

c. A mounted and non-removable locking safe or locked room with a security door and contact alarm permanently affixed to the premises that is suitable for storage of all cannabis, cannabis products, and currency ~~cash~~ stored overnight on the licensed premises; and [Amended 08/16/2023]

d. Exterior lighting that illuminates the exterior walls of the licensed premises during dusk to dawn, that is either constantly on or activated by motion detectors, and complies with applicable provisions of the lighting performance standards in the Town of Scarborough Zoning Ordinance and the Good Neighbor Ordinance; and

e. Deadbolt locks on all exterior doors and any other exterior access points, excepting windows which shall have locks and bars or equipped with monitored glass-break sensors; and

f. Methods to ensure that no person under the age of twenty-one (21) shall have access to cannabis and cannabis products. [Amended 08/16/2023]

7. Odor and Ventilation. All Cannabis Establishments shall have odor mitigation systems to ensure that the smell of Cannabis shall not be detectable beyond the property boundary, subject to the enforcement process outlined in Section 11. A Cannabis Establishment, and property owner, are responsible for taking any and all measures necessary to ensure this standard is met. Cannabis Cultivation Facilities, or other Cannabis Establishments with increased probability to emit odors, will be subject to the following stipulations:

a. Install an activated carbon, or equivalent, odor mitigation system with a minimum air exchange rate of fifteen (15) air changes per hour in the following areas:

1. mature flower rooms
2. cure rooms
3. trim rooms and packaging rooms
4. hallways adjacent to the mature floor rooms
5. other areas with high odor potential

Alternative odor control technologies may be considered with documentation of efficacy.

b. Replace activated Carbon Media or other filters used to mitigate odor in accordance with the manufacturer's specifications but not less than an annual basis. Carbon Media includes but is not limited to carbon filters, carbon canister filters and pre-filters.

c. All odor mitigation equipment used by an applicant or License holder shall always be in operation unless (1) the interruption is caused by a power outage or power failure; (2) the interruption is caused by routine maintenance, as recommended by the manufacturer, or emergency maintenance, to the odor mitigation equipment; or (3) the Town, in writing, permits otherwise. In the event there is a power outage or power failure, the License shall do whatever is reasonably necessary (e.g., informing Central Maine Power of any power disruption) to ensure power is restored to its facility as soon as reasonably practicable. For any disruption due to maintenance, the License holder shall ensure the odor mitigation equipment is returned to service or replaced as soon as reasonably practicable.

d. No exterior venting of cannabis odor unless the applicant or License holder: (1) notifies the Town; (2) provides evidence of the cannabis odor being properly treated before exhausted outside; and (3) Town approves of the exterior venting of the cannabis odor. The Town shall not deny an applicant or License holder from venting odor outside unless either fails to provide sufficient evidence that the odor will be properly treated before its exhausted outside, or the License holder has been fined more than once by the Town for an odor violation.

e. No window air conditioning units or window fans are permitted.

f. All windows must always remain closed.

g. Maintenance Records for all odor mitigation equipment shall be maintained for a period of two (2) years from the date of maintenance. Maintenance Records means records of purchases of replacement carbon filters or other odor mitigation equipment, performed maintenance tracking, documentation and notification of malfunctions or power outages, scheduled and performed training sessions, and monitoring of administrative controls. All Maintenance Records shall be made available for review, upon request from the Town.

h. Submit an Odor Mitigation Plan at the initial application stage of seeking a License. A License holder shall not be required to re-submit an Odor Mitigation Plan upon renewing the License unless there have been changes to the facility floor plan or system design as described in the existing Odor Mitigation Plan. The Odor Mitigation Plan must, at a minimum, includes the following information:

1. **FACILITY ODOR EMISSIONS INFORMATION**

- Facility floor plan. *This section should include a facility floor plan, with locations of odor-emitting activity(ies) and emissions specified. Relevant information may include, but is not limited to, the location of doors, windows, ventilation systems, and odor sources. If a facility has already provided the locations of specific odor-emitting activities and emissions in its business license application floor plan, it may instead reference the facility's business file number(s) and the relevant sections within such application where the floor plan is located.*

- System design. *The system design should describe the odor control technologies that are installed and operational at the facility (e.g., carbon filtration) and to which odor-emitting activities, sources, and locations they are applied (e.g., bud room exhaust).*
- Specific odor-emitting activity(ies). *This section should describe the odor-emitting activities or processes (e.g., cultivation) that take place at the facility, the source(s) (e.g., budding plants) of those odors, and the location(s) from which they are emitted (e.g., flowering room).*
- Phases (timing, length, etc.) of odor-emitting activities. *This section should describe the phases of the odor-emitting activities that take place at the facility (e.g., harvesting), with what frequency they take place (e.g., every two weeks on Tuesdays), and for how long they last (e.g., 48 hours).*
- Odor Mitigation Specification Template. *Form can be found on the Town's Cannabis Establishment License webpage.*

2. ADMINISTRATIVE CONTROLS

- Procedural Activities. *This section should describe activities such as building management responsibilities (e.g., isolating odor-emitting activities from other areas of the buildings through closing doors and windows).*
- Staff training procedures *This section should describe the organizational responsibility(ies) and the role/title(s) of the staff members who will be trained about odor control; the specific administrative and engineering activities that the training will encompass; and the frequency, duration, and format of the training (e.g., 60 minute in-person training of X staff, including the importance of closing doors and windows and ensuring exhaust and filtration systems are running as required).*
- Recordkeeping systems and forms *This section should include a description of the records that will be maintained (e.g., records of purchases of replacement carbon filter, performed maintenance tracking, documentation and notification of malfunctions, scheduled and performed training sessions, and monitoring of administrative controls). Any examples of facility recordkeeping forms should be included as appendices to the Plan.*

8. Cannabis Waste and Disposal. No cannabis, cannabis products, cannabis plants, or other cannabis waste may be stored outside, other than in secured, locked containers. Any wastewater shall be treated such that it will not create excessive odors, contamination, or pollution. [amended 08/16/2023]

9. Signs. In addition to the sign regulations contained in Chapter 405, Zoning Ordinance, signage must comply with the requirements in 22 M.R.S.A. §2429-B and 28-B M.R.S.A. §702.

B. Right of Access /Inspection.

1. Every Cannabis Establishment shall allow the Scarborough Code Enforcement Officer ("CEO"), Fire Department, and Police Department to enter the premises at reasonable times for the purpose of checking compliance with all applicable State laws and this Ordinance.
2. All Cannabis Establishments shall agree to be inspected annually by the Scarborough Fire Department and have a Knox Box installed at the structure's exterior entrance for emergency access. Knox Boxes shall be obtained and installed in coordination with the Scarborough Fire Department.

C. Insurance and Indemnification.

1. Each Cannabis establishment shall procure and maintain commercial general liability coverage in the minimum amount of $1,000,000 per occurrence for bodily injury, death, and property damage.
2. By accepting a license issued pursuant to this Ordinance, the licensee knowingly and voluntarily waives and releases the Town, its officers, elected officials, employees, attorneys, and agents from any liability for injuries, damages, or liabilities of any kind that result from any arrest or prosecution of any Cannabis Establishment owners, operators, employees, clients, or customers for a violation of local, State or federal laws, rules, or regulations.
3. By accepting a license issued pursuant to this Ordinance, the permittee/licensee agrees to indemnify, defend, and hold harmless the Town, its officers, elected officials, employees, attorneys, agents, and insurers against all liability, claims, and demands on account of any injury, loss or damage, including without limitation, claims arising from bodily injury, personal injury, sickness, disease, death, property loss or damage, or any other loss of any kind whatsoever arising out of or in any manner connected with the operation of a licensed Cannabis Establishment.

D. State Law

In the event the State of Maine adopts any additional or stricter law or regulation governing the sale, cultivation, manufacture, distribution, or testing of Cannabis or Cannabis products, the additional or stricter regulation shall control the establishment or operation of any Cannabis Establishment in Scarborough.

Compliance with all applicable State laws and regulation shall be deemed an additional requirement for issuance or denial of any license under this Ordinance, and noncompliance with State laws or regulations shall be grounds for revocation or suspension of any license issued hereunder.

Section 11. Odor Observation and Enforcement [Adopted 08/16/2023]

Per Section 10(7), odor of cannabis by a Licensee shall not be detectable beyond the property boundary. Cannabis odor observation shall be undertaken to arrive at a determination that a cannabis odor exists beyond the property line. All cannabis odor observations made by the Town shall be made in writing. This Section only applies to Licensed Cannabis Establishments.

A. This section of the ordinance may be enforced by any Code Enforcement or Law Enforcement officer.

B. No person shall interfere with, oppose, or resist any authorized person charged with the enforcement of this ordinance while such person is engaged in the performance of her/his duty.

C. Violations of this ordinance shall be prosecuted in the same manner as other civil violations; provided, however, that for an initial violation of this ordinance, a written notice of violation may be given to the alleged violating owner of the licensed premises which specifies the time by which the condition shall be corrected. No complaint or further action shall be taken on the initial violation if the cause of the violation has been removed or the condition abated or fully corrected within the time period specified in the written notice of violation. If the cause of the violation is not abated or fully corrected within the time period specified in the written notice of violation, or if the licensee commits a subsequent violation of the same provision or provisions~~,~~ of this ordinance specified in the written notice, then no further action is required prior to prosecution of the civil violation. If, due to a multi-tenant situation or other ~~the~~reasons, the alleged violating licensee cannot be identified ~~-~~in order to serve the notice of intention to prosecute, the notice as required shall be deemed to be given upon mailing such notice by registered or certified mail to the ~~alleged violating licensee at her/his last known address or at the~~ owner of the ~~place~~licensed premises where the violation occurred, and shall be posted in a conspicuous location at that premises, ~~-~~in which event the specified time period for abating or appealing the violation shall commence at the date of the day following the mailing of such notice.

After the fifth (5^{th}) violation within the license period, the licensee(s) shall have their license referred to the Town Council for a suspension or revocation hearing within thirty (30) days of the complaint being verified.

~~A cannabis odor complaint shall be defined as a receiving four (4) or more written cannabis complaints, from a minimum of two (2) parties, one of which must be from a residence or business within 750 feet of the suspected licensed premises emitting the odor. The four (4) complaints must be reported within four (4) days of each other.~~

~~1. Within forty-eight (48) hours of receiving a cannabis odor complaint, as defined above, a Code Enforcement Officer shall investigate the complaint and notify the Licensee(s) and Landlord of the licensed premises that a cannabis odor complaint has been received. The Code Enforcement Officer's investigation shall include an initial inspection and, if odor is not detected, a second inspection of the abutting properties to investigate whether the cannabis odor is present. If odor is not detected at either of the two inspections, the complaint will be recorded as unconfirmed and Licensee(s) and Landlord will be notified of this finding. If cannabis odor is detected, the Licensee(s) and Landlord will be notified that the complaint has been verified and the CEO shall provide verbal notice of violation and instruct the Licensee or Landlord to comply with this Ordinance. The Licensee or Landlord will be required to notify the Code Enforcement Department, in writing, of corrective action taken to resolve the violation within ten business days of receiving the verbal notice of violation. Failure of the Licensee and/or Landlord to provide written notification of corrective action taken within 10 business days of the verbal notice will result in penalties assessed for each day thereafter until written notice of corrective action taken is received.~~

2. If a second cannabis odor complaint, as defined above, attributed to the same Licensee or Licensed Premises is received, the process outlined in one (1) above, will be followed.

3. If a third cannabis odor complaint, as defined above, attributable to the same Licensee or Licensed Premises is received, the Cannabis Odor Panel ("Odor Panel") will be convened to investigate the cannabis odor complaint. The Licensee (if known) and the Landlord must be notified of the date and time when the Odor Panel will meet, and be permitted to witness the Odor Panel's investigation. The Licensee and/or Landlord may send a representative to meet the Odor Panel on their behalf. The investigation of the complaint shall include an initial inspection and, if odor is not detected, a second inspection shall be conducted by a minimum of three (3) Odor Panel members within four (4) days of receiving the third complaint. If odor is not detected at either of the two inspections, the complaint will be recorded as unconfirmed and Licensee(s) and Landlord will be notified of this finding. If cannabis odor is detected at either inspection, the Licensee(s) and Landlord will be notified and subject to the following:

    a. Notify the Licensee of the third violation in writing;
    b. Assess a fine for the violation, and;
    c. Require the Licensee to submit a written report from a mechanical engineer or odor management specialist with recommendations for modification/improvement of the odor mitigation system within thirty(30) days of receipt of notice of violation, and;
    d. Require implementation of recommendations within sixty (60) days.
    e. Unless an extension to submit the report and/or notice of compliance is granted by the Code Enforcement Department, failure of the Licensee to meet the deadlines for steps c. or d. shall result in an immediate suspension of the Local License until the report or notice of compliance is submitted to the Code Enforcement Department.

4. If, after completing the process outlined in step three (3) above, a fourth complaint is received, the Cannabis Odor Panel will be convened to investigate the cannabis odor complaint. The Licensee (if known) and the Landlord must be notified of the date and time when the Odor Panel will meet, and be permitted to witness the Odor Panel's investigation. The Licensee and/or Landlord may send a representative to meet the Odor Panel on their behalf. The investigation of the complaint shall include an initial inspection and, if odor is not detected, a second inspection shall be conducted by a minimum of three (3) Odor Panel members within four (4) days of receiving the third complaint. If odor is not detected at either of the two inspections, the complaint will be recorded as unconfirmed and Licensee(s) and Landlord will be notified of this finding. If cannabis odor is detected at either inspection, the Licensee(s) and Landlord will be notified and the applicable licenses will be subject to a revocation hearing by the Town Council within 30 days of the complaint being verified.

While a licensee or landlord is within the administrative enforcement process, which shall be defined as the period between being notified a complaint has been verified and the required follow-

~~up action or communication, complaints will continue to be verified by the CEO but they will not be subject to subsequent notices of violation or penalties.~~

~~All complaints and any related documentation associated with the investigation of the cannabis odor complaints shall be made available to the Licensee or Landlord, at no cost, within ten business days of the Town Council meeting to consider the Licensee's Local License or the Landlord's property.~~

~~In the event the Town Council suspends or revokes a Licensee's Local License, the Town Council shall give the Licensee, if permitted under State law, a reasonable period to remove all Cannabis from the Licensee's Licensed Premise. All odor mitigation equipment must remain in operation and in compliance with this Ordinance until the Cannabis is removed from the Licensed Premises. In the event the Town Council suspends and/or revokes the Licensee's Local License and the Licensee is operating as an Adult Use Cannabis Establishment, the Town shall notify the Office of Cannabis Policy of the suspension or revocation.~~

~~At any point the CEO or Odor Panel is unable to verify the odor complaints, the violation process reverts back to the previous completed step of the enforcement process as described herein. If a Landlord or Licensee has not received any verbal or written notice of violation under this Section for one year from the date of the last verbal or written notice of violation, the violation process reverts to the beginning of the violation process as described herein.~~

Section 12. Violations and Penalties.

This Ordinance shall be enforced by the Code Enforcement Officer or her/his designees, who may institute any and all actions to be brought in the name of the Town.

A. Any violation of this Ordinance, including the operation of a Cannabis Establishment without a valid Local License ~~and failure~~and failure to comply with any condition, shall be subject to civil penalties in the minimum amount of $100 and the maximum amount of $2,500. Every day a violation exists constitutes a separate violation. Any such fine may be in addition to any suspension or revocation imposed in accordance with the provisions of this Ordinance. In any court action, the Town may seek injunctive relief in addition to penalties, and shall be entitled to recover its costs of enforcement, including its attorney's fees.

B. In addition to any other remedies provided by this Ordinance, the Town may take all necessary steps to immediately shut down any Cannabis business and post the business and the space that it occupies against occupancy for the following violations: operating a Cannabis business without a Local License or State License; failure to allow entrance and inspection to any Town official on official business after a reasonable request; and any other violation that the Town determines as the potential to threaten the health and/or safety of the public, including significant fire and life safety violations.

C. The Town Manager shall inform members of the Town Council before instituting action in court, but need not obtain the consent of the Town Council, and the Town Manager may institute an action for injunctive relief without first informing members of the Town Council in circumstances where immediate relief is needed to prevent a serious public harm. In addition, the Town Manager may enter into administrative consent

agreements in the name of the Town for the purposes of eliminating violations and recovering penalties without court action

Section 13. Appeals.

A. Any appeal of a decision of the Town Council to issue, issue with conditions, deny, or revoke a license shall be to the Superior Court in accordance with the requirements of Rule 80B of the Maine Rules of Civil Procedure.

B. Any order, requirement, decision, or determination made, or failure to act, in the enforcement of this ordinance by the CEO or Police Chief is appealable to the Zoning Board of Appeals.

Section 14. Severability.

The provisions of this Ordinance are severable, and if any provision shall be declared to be invalid or void, the remaining provisions shall not be affected and shall remain in full force and effect.

Section 15. Other Laws.

Except as otherwise specifically provided herein, this Ordinance incorporates the requirements and procedures set forth in the Maine Medical Use of Cannabis Act, 22 M.R.S.A. Chapter 558-C, as may be amended and the Cannabis Legalization Act, 28-B M.R.S.A. Chapter 1, as may be amended. In the event of a conflict between the provisions of this Chapter and the provisions of the above laws or any other applicable State or local law or regulation, the more restrictive provision shall control.

BERN
STEIN
SHUR

Bernstein, Shur,
Sawyer & Nelson, P.A.
100 Middle Street
PO Box 9729
Portland, ME 04104-5029

T (207) 774 - 1200
F (207) 774 - 1127

Memorandum

To: Scarborough Town Council Ordinance Committee

From: Philip R. Saucier, Esq.

Date: January 9, 2024

Re: Municipal regulation of cannabis establishments

You have asked me to briefly summarize the Council's authority to regulate both medical and adult use cannabis establishments in the Town of Scarborough under Maine law.

I. State Law

Cannabis is regulated under state law by the Maine Medical Use of Cannabis Act (22 M.R.S. ch. 558-C) and the Cannabis Legalization Act (28-B M.R.S. ch. 1). The Legislature has given municipalities broad discretion on whether to allow cannabis establishments to operate within their boundaries and to regulate such uses.

A. Cannabis Establishments

Both laws recognize and regulate four types of cannabis establishments:

- Medical cannabis establishments: caregiver retail stores, registered dispensaries, cannabis testing facilities, and manufacturing facilities.
    - Many municipalities also regulate "medical cannabis cultivation facilities" – a use that is not defined under state law but is defined under Scarborough's ordinance as "a medical cannabis cultivation area used or occupied by one or more medical cannabis registered caregivers and a facility licensed under this ordinance to cultivate, prepare and package medical cannabis at a location that is not the residence of the Registered Caregiver or Qualifying Patient."
- Adult use cannabis establishments: cannabis stores, cultivation facilities, testing facilities, and products manufacturing facility.

B. Opt-In and Regulatory Options

Under both laws, cannabis establishments are prohibited from operating in a municipality unless the legislative body votes to allow such uses to operate within the municipality.

- Medical cannabis exceptions:

    - Municipalities cannot prohibit caregiver retail stores, registered dispensaries, cannabis testing facilities and manufacturing facilities that were operating with municipal approval prior to December 13, 2018. "Municipal approval" means an examination and approval of the type of medical cannabis establishment, not simply the issuance of a building permit or other approval that does not address the use of the facility or structure. 22 M.R.S. § 2429-D(2).

    - Municipalities can regulate registered caregivers but cannot prohibit or limit the number of registered caregivers. Cannabis cultivation facilities are not one of the "opt-in" establishments, but municipalities do have the authority to regulate such uses.

- Adult use cannabis: This law does not contain any "grandfathering" provisions for establishments operating prior to a certain date. 28-A M.R.S. §§ 401, 402.

Municipalities are given broad discretion and have a wide variety of options to regulate cannabis establishments:

1. Prohibit such establishments by choosing not to opt-in.
2. Allow some, but not all, categories of cannabis establishments to operate in the municipality.
3. Limit the number of cannabis establishments that can operate.
4. Adopt land use regulations (such as zoning, performance standards, and space and bulk requirements).
5. Adopt licensing requirements and associated reasonable fees.

The Town currently allows the following cannabis establishments to operate, subject to licensing and zoning requirements: adult use and medical cultivation facilities, adult use and medical manufacturing facilities, adult use and medical testing facilities, and medical cannabis dispensaries. Adult use and caregiver retail stores are not permitted to operate in the Town.

II. Nonconformance

A. Scarborough Zoning Ordinance.

In the event the Council decides to "opt-out" and not allow certain types of cannabis establishments that are currently permitted to operate in the Town, such establishments would be subject to the nonconforming use provisions in the Zoning Ordinance. Once a nonconforming use is established, the right to continue the use is considered to be a vested property right, and such provisions are thus included in land use ordinances to avoid any constitutional issues. While nonconforming uses are allowed to continue to operate, they can be restricted from being

enlarged, increased, or extended to occupy a greater area of land. Under the Town's Zoning Ordinance, once a nonconforming use is abandoned for more than one year, it loses its legal nonconforming status and the land and structure can only be used for conforming uses, which is consistent with the goal to eventually eliminate nonconforming uses.

The following are the relevant nonconforming use provisions in Section III of the Zoning Ordinance:

A. Continuation of Non-Conformance

Any lawful use of buildings, structures, land, or parts thereof existing at the time of adoption or amendment of this Ordinance, and made non-conforming by the provisions of this Ordinance or any amendments thereto, may be continued, subject to the provisions of this Section.

B. Non-Conforming Use of Land

1. No non-conforming use of land shall be enlarged or increased nor extended to occupy a greater area of land than that occupied at the effective date of adoption or amendment of this Ordinance.

2. No non-conforming use of land shall be moved in whole or in part to any portion of the lot, which was not occupied by such use at the effective date of adoption of this Ordinance.

3. If any non-conforming use of land ceases for any reason for a period of more than one year, any subsequent use of such land shall conform to the regulations specified by this Ordinance for the district in which such land is located.

C. Non-Conforming Uses of Structure

1. No existing structure devoted to a non-conforming use shall be enlarged, extended, or expanded except in changing the use of the structure to conforming use.

2. Any non-conforming use may be extended throughout any parts of a building, which were manifestly in existence and arranged or designed for such use at the time of the adoption or amendment of this Ordinance, but no such use shall be extended to occupy any land outside such building.

3. If a non-conforming use of a structure is superseded by a permitted use, the non-conforming use shall not thereafter be resumed.

4. If any non-conforming use of a structure ceases for any reason for a period of more than one year, any subsequent use of such structure shall conform to the regulations specified by this Ordinance for the District in which such structure is located.

B. Amortization

You have also asked if the Council could gradually phase out a legally nonconforming use, notwithstanding the nonconformance provisions in the Zoning Ordinance. The phasing out of a legally nonconforming use over time is called "amortization." The legal justification is that because the phasing out of the nonconforming use has been set over a period of time, it is not an unconstitutional taking of property and no compensation is payable at the expiration of the period, as the operator of the use is given a grace period to recoup any funds spent on a particular use before it is terminated.

There is legal support for a phasing out/amortization program in Maine, articulated in a case from the 1970s that upheld the gradual phasing out of billboards. *See State v. National Advertising Co.*, 409 A.2d 1277 (Me. 1979). In that case, the Maine Supreme Judicial Court concluded that the use of an amortization period to eliminate nonconforming billboard signs was a legislative object of the exercise of the police power and was not an unconstitutional taking of property – and concluded that a five-year amortization period was sufficient for that program.

If the Council chooses to move forward with a phasing out of certain cannabis establishments, it should determine a phasing out period that is sufficient and reasonable to allow for a change of use and for the operator of the business to recoup its investment. Under the *National Advertising* case, we have some guidance that a five-year period may be sufficient, but it will depend on the particular circumstances of these uses. Finally, given the explicit restriction in 22 M.R.S. § 2429-D(2), the Town cannot gradually phase out any medical cannabis establishment operating with municipal approval prior to December 13, 2018.

PRS/jm

2 Am. Law. Zoning § 12:23 (5th ed.)

American Law of Zoning | November 2023 Update
Patricia E. Salkin

Chapter 12. Nonconforming Uses *

§ 12:23. Amortization

Although it was initially believed that nonconforming uses would gradually disappear due to obsolescence and restrictions on their change and expansion, it soon became clear that more stringent measures were necessary to eliminate nonconforming uses. Amortization arose as the most popular solution. As one commentator explained:

> The beginnings of amortization can be traced from the birth of zoning ordinance in 1916, but it was not until the early 1950's that amortization began to be more widely adopted. The technique was used sporadically until 1965. During this period, it became apparent that amortization was most effective in eliminating uses having structures with relatively low values, like non-conforming signs or sheds with outdoor storage. [1]

The New York Court of Appeals provided an excellent explanation of the mechanics and legal underpinnings of amortization in the 1994 case *Village of Valatie v. Smith*. As the court stated in one section of its decision:

> Most often, elimination has been effected by establishing amortization periods, at the conclusion of which the nonconforming use must end. As commentators have noted, the term "amortization period" is somewhat misleading. "Amortization" properly refers to a liquidation, but in this context the owner is not required to take any particular financial step. "Amortization period" simply designates a period of time granted to owners of nonconforming uses during which they may phase out their operations as they see fit and make other arrangements. It is, in effect, a grace period, putting owners on fair notice of the law and giving them a fair opportunity to recoup their investment. [2]

Municipalities have devised a variety of techniques for fixing amortization periods and implementing amortization procedures. [3] Typically, amortization ordinances provide a specific period of time that applies to the amortization of all nonconforming uses. Extensions may also be offered under amortization ordinances. [4] Ordinances need not adopt a uniform amortization period, however, and they may instead determine amortization periods on a case-to-case basis using a schedule or formula based on the value of nonconforming property and time needed to recoup the investment. [5]

In addition to providing a fixed period or schedule for amortization, an ordinance may also specify that a nonconforming use will be terminated upon the occurrence of a condition precedent, such involuntary destruction [6] or removal [7] of the use. Ordinances occasionally specify that a nonconforming use will be discontinued upon transfer of the property to a subsequent owner, but such provisions are of questionable validity given the character of nonconforming use rights as vested property interests. [8]

Most of the states have accepted amortization as a constitutional method of terminating nonconforming uses. In these jurisdictions, amortization provisions will be upheld so long as they provide a reasonable time period for amortization. [9] As the New York Court of Appeals explained, "courts have declared valid a variety of amortization periods. Indeed, in some circumstances, no amortization period at all is required. In other circumstances, the amortization period may vary in duration

among the affected properties. We have also held that an amortization period may validly come to an end at the occurrence of an event as unpredictable as the destruction of the nonconforming use by fire. … We have never required that the length of the amortization period be based on a municipality's land use objectives. To the contrary, the periods are routinely calculated to protect the rights of individual owners *at the temporary expense of* public land use objectives. Typically, the period of time allowed has been measured for reasonableness by considering whether the owners had adequate time to recoup their investment in the use. Patently …, the setting of the amortization period involves balancing the interests of the individual and those of the public." [10]

Although reasonableness thus depends on the circumstances of each case, the courts have upheld amortization periods of six months, [11] one year, [12] two years, [13] three years, [14] five years, [15] 10 years, [16] and 20-25 years. [17] The Ninth Circuit even held in one case that the owner of a card room operation was not entitled to any amortization period because under Washington law, a gambling license cannot create a vested right, and as such, there was no constitutional entitlement to amortization. [18] A Pennsylvania court found that a 90 day amortization period was unreasonable, however, noting that "A gradual phasing out of nonconforming uses which occurs when an ordinance only restricts future uses differs in significant measure from an amortization provision which restricts future uses *and* extinguishes a lawful nonconforming use on a timetable which is not of the property owner's choosing." [19] In another case, a Connecticut court found that a four year amortization provision was unreasonable as applied to an excavation operation. [20]

Determining whether an amortization period is reasonable requires a balancing of the public and private interests at stake as well as any additional factors specified in the ordinance. Most courts agree that the property owner's ability to recoup its losses is a significant factor. [21] As a California court noted, "Relevant factors to be considered in determining whether an amortization period is unreasonable as applied to a particular property include amount of investment or original cost, present actual or depreciated value, dates of construction, amortization for tax purposes, salvage value, 'remaining useful life, the length and remaining term of the lease under which it is maintained, and the harm to the public if the structure remains standing beyond the prescribed amortization period.'" [22] The failure of an amortization ordinance to allow the full depreciation of the property owner's investment does not automatically render the provision unreasonable, however. [23]

Aside from the recoupment of investment costs, other considerations that may be taken into account include the municipality's land use objectives, [24] depreciation for tax purposes, [25] and the costs associated with termination or relocation. [26]

Amortization requirements are generally presumed to be reasonable and the property owner carries a heavy burden of overcoming that presumption by demonstrating that its loss is so substantial that it outweighs the public benefit to be gained by the elimination of the nonconformity. [27] Substantial evidence of the property owner's injuries is required in most cases to satisfy this burden. [28]

An amortization period may be held unreasonable if the municipality failed to the weight relevant factors in determining the length of the period or failed to rely on substantial evidence. [29] In a New Mexico case, for example, the court found that a one-year amortization period was unreasonable because it was only enacted on a temporary basis to give the city time to accumulated evidence in support of a permanent reduction of the ordinance's standard 40 year amortization period. The record, the court found, reflected no weighing of the interests as they affected the property owner's helicopter pad, and the matter was accordingly remanded to city for a consideration of such evidence. [30]

An amortization provision may also be held invalid if is applied in a discriminatory manner, [31] but equal protection challenges will usually be dismissed if the only claim is the amortization requirement applies to some types of nonconforming uses but not others. A Minnesota court, for instance, upheld an amortization ordinance that applied to the property owner's nonconforming concrete plant but exempted nonconforming bars. As the court explained, the ordinance did not treat similarly situated entities differently because there were no other concrete plants in the city and because the property owner's plant was a heavy industrial use that significantly more severe and disruptive impacts than nonconforming bars. [32]

State or federal preemption may be another ground for invalidation of an amortization ordinance. [33] A 2006 Colorado case, for example, held that a local amortization requirement was superseded by a state law that prohibited municipalities from

terminating or amortizing nonconforming uses that were lawful at their inception. [34] In another case, a New York court held that a zoning amendment which restricted the location of check cashing businesses and imposed a five year amortization provision was preempted by state law, which delegated the task of determining appropriate locations for such businesses to the state superintendent of banks. [35]

Substantive due process challenges are rarely asserted against amortization ordinances because as long as the zoning ordinance that rendered the property nonconforming was based on a proper public purpose, there is no requirement that the amortization ordinance be predicated on an independent public purpose. [36] Takings challenges, on the other hand, are frequently made, but their analysis is closely intertwined with and often subsumed by the issue of whether the amortization period is reasonable. [37] Where billboards and adult uses are involved, amortization ordinances may also raise constitutional concerns under the First Amendment. [38] The amortization of these uses is discussed in more detail in other sections of this treatise. [39]

Footnotes

* The 2014 update chapter was prepared by Amy Lavine, Esq.

1 Margaret Collins, Methods of Determining Amortization Periods for Non-Conforming Uses, Festschrift Vol. 3:215, 216 (2000), available at https://law.wustl.edu/journal/3/pg215to239.pdf.

2 Village of Valatie v. Smith, 83 N.Y.2d 396, 610 N.Y.S.2d 941, 632 N.E.2d 1264 (1994).

3 See generally Margaret Collins, Methods of Determining Amortization Periods for Non-Conforming Uses, Festschrift Vol. 3:215, 216 (2000), available at https://law.wustl.edu/journal/3/pg215to239.pdf ("The use of amortization to eliminate non-conforming uses has been fragmented and, for the most part, limited to uses where there has been little or no substantial investment in structures. There is no general consensus on methods of setting amortization periods, particularly for major structures; this is partly because the technique has rarely been applied to high value buildings.").

4 See, e.g.,

Arkansas: Fisher Buick, Inc. v. City of Fayetteville, 286 Ark. 49, 689 S.W.2d 350 (1985) (holding that where an amortization provision was reasonable, the lessees were not entitled to a variance or extension simply because their leases extended past the amortization date).

Illinois: Cook County v. Renaissance Arcade and Bookstore, 122 Ill. 2d 123, 118 Ill. Dec. 618, 522 N.E.2d 73 (1988) (amortization provision allowing adult businesses six months to relocate, with six-month extension available, was not unconstitutional).

New York: Suffolk Asphalt Supply, Inc. v. Zoning Bd. of Appeals of Village of Westhampton Beach, 59 A.D.3d 452, 873 N.Y.S.2d 138 (2d Dep't 2009) (Termination of the nonconforming asphalt plant was reasonable where the village had adopted an ordinance in 2000 providing that the nonconforming use would be terminated in one year and the plant had applied for and received a five-year extension; "Since the petitioner received from the ZBA all of the relief to which it was entitled under the local law, the Supreme Court properly denied the petition and dismissed the proceeding.").

Washington: World Wide Video of Washington, Inc. v. City of Spokane, 125 Wash. App. 289, 103 P.3d 1265 (Div. 3 2005) (upholding an extension process where the discretion of the planning director was limited by the requirement that applicants had to demonstrate "extreme economic hardship based

upon an irreversible financial investment or commitment" and upholding that planning director's finding that the property owner failed to establish such hardship).

5 See, e.g.,

Connecticut: WFS Earth Materials, LLC v. Planning and Zoning Com'n of Town of Haddam, 2010 WL 5065107 (Conn. Super. Ct. 2010) (discussing an amortization requirement that limited the excavation use not to a set period of time, but to a lifetime limit on the volume of excavated materials and a yearly limit on the operation's acreage).

Utah: M & S Cox Investments, LLC v. Provo City Corp., 2007 UT App 315, 169 P.3d 789 (Utah Ct. App. 2007) (Upholding an amortization formula which provided that "The time period during which an owner may recover the amount of his investment in property affected by [the Ordinance] shall be determined by dividing the residual value of the property by the average monthly net rental income from the property.").

6 See, e.g.,

Iowa: Newt v. City of Dubuque, 725 N.W.2d 659 (Iowa Ct. App. 2006) (although the property was a nonconforming industrial property established before a planned unit development ordinance was passed, its nonconforming use status did not entitle it to relocate and rebuild a storage building which was condemned in order to build a bridge; the ordinance provided that nonconforming structures could not be rebuilt after destruction of 50% or more, and as such, reconstruction of the storage building would be an illegal expansion).

New York: Village of Valatie v. Smith, 83 N.Y.2d 396, 610 N.Y.S.2d 941, 632 N.E.2d 1264 (1994) ("We have also held that an amortization period may validly come to an end at the occurrence of an event as unpredictable as the destruction of the nonconforming use by fire. …").

7 See, e.g.,

Indiana: Cracker Barrel Old Country Store, Inc. v. Town of Plainfield ex rel. Plainfield Plan Com'n, 848 N.E.2d 285 (Ind. Ct. App. 2006) ("It is undisputed under the definitions that Cracker Barrel moved its 'sign' and 'sign structure,' i.e., the cabinet and framework that housed the sign surface. Hence, under the plain language of the Ordinance, that movement caused the pole sign to lose its non-conforming use status.").

8 See, e.g.,

Idaho: O'Connor v. City of Moscow, 69 Idaho 37, 202 P.2d 401, 9 A.L.R.2d 1031 (1949) (holding that an ordinance which terminated nonconforming uses upon change of ownership was invalid because there was no reasonable relationship between change of ownership and the purposes of the zoning ordinance and noting that enforcement of this type of provision would affect not only the current owner, but also mortagees, heirs, devisees, and legatees).

9 See, e.g.,

Indiana: Board of Zoning Appeals, Bloomington, Ind. v. Leisz, 702 N.E.2d 1026 (Ind. 1998) (Overruling an earlier decision of the Indiana Supreme Court which had held that amortization provisions were per se unconstitutional and noting that "Most states allow local zoning authorities to phase out nonconforming uses with amortization provisions that require the owner to discontinue the nonconforming use after a certain period of time.").

Maryland: Trip Associates, Inc. v. Mayor and City Council of Baltimore, 392 Md. 563, 898 A.2d 449 (2006) ("So long as it provides for a reasonable relationship between the amortization and the nature of the nonconforming use, an ordinance prescribing such amortization is not unconstitutional.").

Texas: Swain v. Board of Adjustment of City of University Park, 433 S.W.2d 727 (Tex. Civ. App. Dallas 1968), writ refused n.r.e., (May 7, 1969) ("[I]n recent years the trend of authorities has been to grant to municipalities the right and power to provide in their comprehensive zoning ordinances provisions for the discontinuance of nonconforming uses provided such were reasonable and a proper exercise of police power. Thus if the ordinance extended to the nonconforming user a reasonable time within which the full value of the investment could be amortized then such would be considered valid."); Baird v. City of Melissa, 170 S.W.3d 921 (Tex. App. Dallas 2005) ("Concerning the City's enactment of the Amortization Ordinance, we conclude that Baird fails to meet the "extraordinary burden" of showing that "no conclusive or even controversial or issuable fact" was raised on the question whether the zoning regulation has a substantial relationship to the protection of the public's health, safety or welfare.").

10 Village of Valatie v. Smith, 83 N.Y.2d 396, 610 N.Y.S.2d 941, 632 N.E.2d 1264 (1994).

11 See, e.g.,

Illinois: Cook County v. Renaissance Arcade and Bookstore, 122 Ill. 2d 123, 118 Ill. Dec. 618, 522 N.E.2d 73 (1988) (amortization provision allowing adult businesses six months to relocate, with six-month extension available, was not unconstitutional).

12 See, e.g.,

Eighth Circuit: PAO Xiong v. City of Moorhead, Minn., 641 F. Supp. 2d 822 (D. Minn. 2009) ("In this case, the amortization provision allows non-conforming adult uses one year to relocate. Adult establishments may also apply for an additional one-year extension. It is clear that a municipality may require a non-conforming adult business to relocate, and the Court concludes that the time periods in the ordinance are not an unreasonable period of time for adult establishments to accomplish this.").

New York: Suffolk Asphalt Supply, Inc. v. Zoning Bd. of Appeals of Village of Westhampton Beach, 59 A.D.3d 452, 873 N.Y.S.2d 138 (2d Dep't 2009) (Termination of the nonconforming asphalt plant was reasonable where the village had adopted an ordinance in 2000 providing that the nonconforming use would be terminated in one year and the plant had applied for and received a five-year extension; "Since the petitioner received from the ZBA all of the relief to which it was entitled under the local law, the Supreme Court properly denied the petition and dismissed the proceeding.").

13 See, e.g.,

Fourth Circuit: A Helping Hand, LLC v. Baltimore County, MD, 355 Fed. Appx. 773 (4th Cir. 2009) (Refusing to extend a two-year injunction against enforcement of an ordinance restricting methadone clinics because "The County's enforcement of the ordinance against the Clinic could require the Clinic to relocate. Undoubtedly, relocation would result in some costs and inconvenience for the Clinic. That injury, however, does not constitute irreparable (rather than temporary) injury, and money damages could compensate any cost to the Clinic. … In sum, the Clinic has failed to demonstrate entitlement to injunctive relief. We therefore vacate the injunction. Thus the ordinance, including its amortization provision, will apply to the Clinic from the date of the entry of our mandate.").

14 See, e.g.,

Eighth Circuit: Ambassador Books & Video, Inc. v. City of Little Rock, Ark., 20 F.3d 858, 865 (8th Cir. 1994) (upholding application of three-year amortization period to existing adult businesses).

15 See, e.g.,

Eighth Circuit: Outdoor Graphics, Inc. v. City of Burlington, Iowa, 103 F.3d 690 (8th Cir. 1996) (five-year amortization period, which was designed to eliminate billboards in residential districts, was a reasonable regulation).

Maryland: Chesapeake Outdoor Enterprises, Inc. v. Mayor and City Council of Baltimore, 89 Md. App. 54, 597 A.2d 503 (1991) (noting that Maryland courts have upheld four and five year amortization periods, as well as longer ones, and finding that the amortization period was reasonable in this case because the billboard owners had at least 19 years to amortize their signs).

16 See, e.g.,

Colorado: Trailer Haven MHP, LLC v. City of Aurora, 81 P.3d 1132 (Colo. App. 2003) (upholding a code amendment which increased the required spacing between mobile homes and required all nonconforming mobile homes to comply with the new spacing requirement within 10 years).

Montana: Montana Media, Inc. v. Flathead County, 2001 ML 3937 ("The long [ten year] amortization period provided by both the City and the County regulations meet any constitutional test and do not constitute a taking of Plaintiff's property rights without compensation.").

New York: Astoria Landing, Inc. v. New York City Environmental Control Bd., 148 A.D.3d 1141, 50 N.Y.S.3d 448 (2d Dep't 2017), leave to appeal denied, 29 N.Y.3d 913, 2017 WL 2743245 (2017) ("Here, the Supreme Court properly determined that the [Environmental Control Board] had a rational basis for rejecting the petitioner's contention that the sign was valid …. New York City Zoning Resolution § 52-731 expressly sets forth a 10-year time restriction for any nonconforming advertising sign such as the sign at issue, which time restriction had long since expired.").

17 See, e.g.,

California: County of Los Angeles v. Ivanov, 2013 WL 4814999 (Cal. App. 2d Dist. 2013) ("Under the Zoning Code, all properties developed as a mobilehome park prior to 1978 received either a 20-year or 25-year amortization period, after which time the affected property owners were required to either discontinue the nonconforming use or apply for and secure a CUP. … In challenging the amortization …, defendants assert that the amortized schedule amounts are illegal. Again, however, defendants neglect to offer any legal authority in support of their contention. And, other than unfounded hyperbole, there is no evidence or argument to support defendants' claim that the 25-year period to eliminate its nonconforming status was anything less than reasonable.").

18 *Ninth Circuit:* Star Northwest Inc. v. City of Kenmore, 280 Fed. Appx. 654 (9th Cir. 2008), opinion amended on denial of reh'g, 308 Fed. Appx. 62 (9th Cir. 2009).

19 PA Northwestern Distributors, Inc. v. Zoning Hearing Bd. of Tp. of Moon, 526 Pa. 186, 584 A.2d 1372, 8 A.L.R.5th 970 (1991).

20 *Connecticut:* WFS Earth Materials, LLC v. Planning and Zoning Com'n of Town of Haddam, 2010 WL 5065107 (Conn. Super. Ct. 2010) ("[T]he Commissions's order that a maximum of 240,000 cubic yards of excavated material can be removed during the lifetime of the operation, which defendant's counsel estimates will serve to shut down the operation in four years, constitutes an illegal amortization of the plaintiff's nonconforming use, as does the limitation of the operation to five acres within one year. … While the Commission's imposition of the 240,000 cubic yard maximum literally may not serve to terminate plaintiff's excavation operation within a specific period of time, its constructive effect is the relatively imminent elimination of the operation. As a result, the lifetime cubic yard restriction and the acreage limitation, as it applies to the original parcel, constitute illegal amortizations imposed by the Commission.").

21 See, e.g.,

South Carolina: Bugsy's, Inc. v. City of Myrtle Beach, 340 S.C. 87, 530 S.E.2d 890 (2000) ("The Zoning Administrator testified in determining an appropriate amortization period, he considered the cost of the video poker machines. He stated he believed a machine costs between $ 3,500 and $8,000 and he used a 'high amount.' … The record indicates the two year amortization period reasonably allowed Bugsy's to recoup the rental cost of its machines. There is no evidence to the contrary. Bugsy's failed to prove its loss outweighed the public gain.").

22 Tahoe Regional Planning Agency v. King, 233 Cal. App. 3d 1365, 285 Cal. Rptr. 335 (3d Dist. 1991).

23 See, e.g.,

Fourth Circuit: Naegele Outdoor Advertising, Inc. v. City of Durham, 803 F. Supp. 1068 (M.D. N.C. 1992), aff'd, 19 F.3d 11 (4th Cir. 1994) ("Although a number of the signs are not fully depreciated and have useful lives remaining after the expiration of the amortization period, the reasonableness of an amortization period does not necessarily depend on the recovery of all value of the property during the allotted time.").

California: Tahoe Regional Planning Agency v. King, 233 Cal. App. 3d 1365, 285 Cal. Rptr. 335 (3d Dist. 1991) ("It is not required that the nonconforming property have no value at the termination date.").

24 See, e.g.,

Minnesota: AVR, Inc. v. City of St. Louis Park, 585 N.W.2d 411 (Minn. Ct. App. 1998) ("AVR further contends that in determining the length of the amortization period, the city gave undue deference to the opinions of area residents instead of applying the factors required by the city's ordinance. … [However,] the record shows that the city's decision was based on more than neighborhood opposition to AVR's plant and expression of concern for public safety. … AVR further argues that the two-year period is unreasonable because amortization periods should be lengthened 'when the amortization is not consistent with the surrounding area or any solid redevelopment plan,' noting that the area surrounding the plant is not exclusively residential. But the record shows that the city's rezoning of AVR's property from I-4 Industrial to R-4 Multifamily Residential is consistent with its plans for the surrounding area.").

New York: Village of Valatie v. Smith, 83 N.Y.2d 396, 610 N.Y.S.2d 941, 632 N.E.2d 1264 (1994) ("We have never required that the length of the amortization period be based on a municipality's land use objectives. To the contrary, the periods are routinely calculated to protect the rights of individual owners *at the temporary expense of* public land use objectives. Typically, the period of time allowed has been measured for reasonableness by considering whether the owners had adequate time to recoup their investment in the use. Patently, such protection of an individual's interest is unrelated to land use objectives. Indeed, were land use objectives the only permissible criteria for scheduling amortization, the law would require immediate elimination of nonconforming uses in all instances.").

25 See, e.g.,

California: National Advertising Co. v. County of Monterey, 1 Cal. 3d 875, 83 Cal. Rptr. 577, 464 P.2d 33, 35–36 (1970) (holding that amortization was reasonable where the billboards had been fully depreciated for tax purposes).

Illinois: Village of Skokie v. Walton on Dempster, Inc., 119 Ill. App. 3d 299, 74 Ill. Dec. 791, 456 N.E.2d 293, 297 (1st Dist. 1983) (concluding that amortization period was reasonable where property was completely depreciated for tax purposes).

New York: Philanz Oldsmobile, Inc. v. Keating, 51 A.D.2d 437, 381 N.Y.S.2d 916, 920 (4th Dep't 1976) (concluding that amortization was reasonable where nonconforming signs had been fully depreciated for tax purposes because their financial loss was nonexistent).

26 See, e.g.,

Ninth Circuit: Santa Barbara Patients' Collective Health Co-op. v. City of Santa Barbara, 911 F. Supp. 2d 884 (C.D. Cal. 2012) (finding that the plaintiff adequately stated a claim for violation of its due process rights; "As a general matter, an amortization 'is insufficient only if it puts a business in an impossible position due to a shortage of relocation sites.' Here, the ordinance itself creates such 'a shortage of relocation sites.' In fact, the Revised Ordinance limits the number of dispensaries … to a total of three. This total includes those dispensaries which are open and operating in a legal, non-conforming manner at the time of the adoption of the ordinance. … The court concludes that Plaintiff has made a strong showing that the amortization period provided by the Revised Ordinance has put Plaintiff in 'an impossible position,' forcing Plaintiff to close its business and lose its permit without due process.").

Texas: Board of Adjustment of City of Dallas v. Winkles, 832 S.W.2d 803 (Tex. App. Dallas 1992), writ denied, (Nov. 11, 1992) (defining full value of the structure for amortization purposes to include the actual dollars invested in the nonconforming structure, and the costs associated with its removal and establishment in another location, but not including the value of the land).

27 See, e.g.

New York: Village of Valatie v. Smith, 83 N.Y.2d 396, 610 N.Y.S.2d 941, 632 N.E.2d 1264 (1994) ("[T]he owner must carry the heavy burden of overcoming that presumption by demonstrating that the loss suffered is so substantial that it outweighs the public benefit to be gained by the exercise of the police power.").

California: Tahoe Regional Planning Agency v. King, 233 Cal. App. 3d 1365, 285 Cal. Rptr. 335 (3d Dist. 1991) ("The central issue in cases involving the termination of nonconforming uses is the reasonableness of the amortization period allowed. The burden is on the advertiser to establish the unreasonableness of the amortization period with regard to each structure declared to be nonconforming.").

South Carolina: Bugsy's, Inc. v. City of Myrtle Beach, 340 S.C. 87, 530 S.E.2d 890 (2000) ("The burden is upon the petitioner to prove the unreasonableness of the amortization period. The period is presumed valid unless the petitioner demonstrates its loss outweighs the public gain.").

28 See, e.g.,

California: South Lake Tahoe Property Owners Group v. City of South Lake Tahoe, 92 Cal. App. 5th 735, 310 Cal. Rptr. 3d 9 (3d Dist. 2023), as modified on denial of reh'g, (July 12, 2023) and review filed, (July 31, 2023) ("Plaintiff did not submit sufficient evidence that created a triable issue of material fact regarding the reasonableness of the three-year amortization period. As already set forth, plaintiff's declarations did not include sufficient detailed information to create a disputed issue on the reasonableness of the amortization period. Nor did they discuss the ability to recover some or all of their investment by using or selling the properties for their permitted uses.").

New York: Suffolk Asphalt Supply, Inc. v. Board of Trustees of Village of Westhampton Beach, 59 A.D.3d 429, 872 N.Y.S.2d 516 (2d Dep't 2009) ("Inasmuch as the plaintiff failed to submit any evidence as to the amount that it actually invested in the business, there remains a question of fact regarding whether the amortization period provided in the local law was reasonable and thus constitutional as applied to the plaintiff. With respect to the plaintiff's contention that the brevity of the amortization period rendered the local law unconstitutional on its face, 'a litigant cannot sustain a facial challenge to a law when that law is constitutional in its application to that litigant.'").

South Carolina: Bugsy's, Inc. v. City of Myrtle Beach, 340 S.C. 87, 530 S.E.2d 890 (2000) ("The Zoning Administrator testified in determining an appropriate amortization period, he considered the cost of the video poker machines. He stated he believed a machine costs between $ 3,500 and $8,000 and he used a 'high amount.' … The record indicates the two year amortization period reasonably allowed Bugsy's

to recoup the rental cost of its machines. There is no evidence to the contrary. Bugsy's failed to prove its loss outweighed the public gain.").

29 See, e.g.,

Minnesota: AVR, Inc. v. City of St. Louis Park, 585 N.W.2d 411 (Minn. Ct. App. 1998) ("AVR also argues that the city's findings with respect to the factors it adopted by ordinance are not supported by sufficient evidence, claiming that the city virtually ignored the ordinance factors in favor of other factors and considerations. But the record shows that in establishing the amortization period for AVR's plant, the city considered each of the factors in its amortization ordinance and that the city's findings regarding these factors are supported by record evidence.").

30 KOB-TV, L.L.C. v. City of Albuquerque, 137 N.M. 388, 2005-NMCA-049, 111 P.3d 708 (Ct. App. 2005).

31 See infra.

32 AVR, Inc. v. City of St. Louis Park, 585 N.W.2d 411 (Minn. Ct. App. 1998).

33 See, e.g.,

Illinois: City of Oakbrook Terrace v. Suburban Bank and Trust Co., 364 Ill. App. 3d 506, 301 Ill. Dec. 135, 845 N.E.2d 1000 (2d Dist. 2006) (holding that just compensation rather than amortization was required where the city attempted to enforce its ordinance pursuant to the eminent domain statute and noting that "'Amortization' has nothing to do with fair market value of the property at its highest and best use on the date the property is deemed condemned. The City's claim, that amortization *is* just compensation, fails.").

New York: Town of Macedon v. Hsarman, 17 Misc. 3d 417, 844 N.Y.S.2d 825 (Sup 2007) (holding that under the a section of the state highway law, just compensation and not amortization was required for the termination of a preexisting billboard).

34 JAM Restaurant, Inc. v. City of Longmont, 140 P.3d 192 (Colo. App. 2006).

35 Sunrise Check Cashing and Payroll Services, Inc. v. Town of Hempstead, 91 A.D.3d 126, 933 N.Y.S.2d 388 (2d Dep't 2011), appeal dismissed, leave to appeal denied, 19 N.Y.3d 848, 946 N.Y.S.2d 102, 969 N.E.2d 220 (2012) and aff'd, 20 N.Y.3d 481, 964 N.Y.S.2d 64, 986 N.E.2d 898 (2013).

36 See, e.g.,

Minnesota: AVR, Inc. v. City of St. Louis Park, 585 N.W.2d 411 (Minn. Ct. App. 1998) ("AVR argues that the two-year amortization period is unreasonable because the city was motivated by aesthetic rather than health and safety considerations. But 'a desire to achieve aesthetic ends should not invalidate an otherwise valid ordinance.' In addition, the city enacted the ordinance establishing the two-year amortization period for several reasons, including improvement of the general welfare by reducing noise, dust, and traffic.").

New York: Cioppa v. Apostol, 301 A.D.2d 987, 755 N.Y.S.2d 458 (3d Dep't 2003) ("so long as the zoning that resulted in the use becoming nonconforming was based upon a proper public purpose, there is no requirement that the amortization of the nonconforming use be predicated upon establishing a nuisance or any other ground that independently places the viability of the nonconforming use in jeopardy").

37 See, e.g.,

Fourth Circuit: Georgia Outdoor Advertising, Inc. v. City of Waynesville, 900 F.2d 783 (4th Cir. 1990) (holding that there is no black-letter rule which immunizes a land-use ordinance from a takings

challenge simply because it contains an amortization period; rather, amortization provisions are only one of the factors to be taken into account in determining whether a compensable taking occurred).

California: Tahoe Regional Planning Agency v. King, 233 Cal. App. 3d 1365, 285 Cal. Rptr. 335 (3d Dist. 1991) (courts must engage in a particularized analysis of the challenged ordinance to determine whether a taking has occurred, and the existence of a reasonable amortization period as an alternative to just compensation does not immunize an municipality from this analysis).

38 See, e.g.,

Ninth Circuit: Isbell v. City of San Diego, 450 F. Supp. 2d 1143 (S.D. Cal. 2006) ("Defendant failed to provide both an accurate list of sites available for an adult use in the city of San Diego and evidence demonstrating that the available sites sufficiently satisfy demand for adult entertainment in San Diego. … Therefore, without more, the Court finds that [the ordinance] is unconstitutional for lack of reasonable alternative avenues of communication.").

39 See infra.

End of Document

Draft Scarborough Zoning Ordinance Amendments related to Marijuana Establishments

Proposed amendments are shown below in underline and strikethrough:

1. **SECTION III. NONCONFORMANCE**

…

F. MARIJUANA CULTIVATION FACILITIES

Notwithstanding any other provision to the contrary in this section, a Marijuana Cultivation Facility operating prior to adoption of this subsection which was made non-conforming because it is located on land no longer permitted for Marijuana Cultivation Facilities pursuant to this Ordinance may remain as a legal non-conforming use for a period not exceeding five (5) years after the effective date of this subsection.

2. **SECTION XVIII.F. PINE POINT INDUSTRIAL OVERLAY DISTRICT – I-O**

….

B. PERMIITTED USES

The use of land and of buildings and structures in the I-O District existing as of the date of adoption of this section shall be governed by the provisions of this section. The use of new or redeveloped buildings or structures and related land shall be governed by the provisions of subsection G.

…

~~25. Marijuana Cultivation Facility conducted with a fully enclosed structure.~~

3. **SECTION XXI. INDUSTRIAL DISTRICT - I.**

…

B. PERMITTED USES

…

29. Marijuana Cultivation Facility conducted within a fully enclosed structure only permitted on lots abutting Washington Avenue.